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CURRENT TOPICS.

In the Chancery Division of the English High Court of Justice, in *Edmunds v. Attorney-General*, 26 W. R. 550, it was recently decided by MALINS, V. C., that where an action is shown to be vexatious, and an abuse of the process of the court, it will be stayed. The Vice-Chancellor said: "It is urged very strongly upon me that there is no precedent to be found for an order of this kind made in the Court of Chancery, or now in the Chancery Division of the High Court. And I suppose, as no precedent has been referred to by counsel on either side, that that is so. Then it is urged that, because it has not been done before, it ought not to be done now. But it must be borne in mind that this court is only a branch of the Supreme Court of Judicature. That court is now one, and it would be an extraordinary thing if that which was good practice in one branch of it should not be good practice in another branch. And, if it is right to stay actions on the ground that they are frivolous and vexatious and an abuse of the process of the court in the other branches, I think it would be a reproach to this branch of the court if it had not the power of doing the same. On principle, I am of opinion that where we find a litigant, like Mr. Edmunds, who will go into inquiries, and if they go against him will consider them as mere nullities, who will have recourse to such a series of vexatious and improper litigations as he has had recourse to, who, when a decision is given against him, will persist in considering that decision as a mere nullity—for he has considered the decision of the arbitrators a nullity, he has considered my decision of January, 1876, as a nullity, the decisions of the common law courts as mere nullities, and the decision of Vice-Chancellor Bacon, staying all proceedings, also a mere nullity—when such a litigant is found, I think it is a most wholesome doctrine that any court should have the power of stopping such a litigation. I can not conceive a stronger instance than this, where Mr. Edmunds, for year after year, now no less than fifteen years, has, on a claim which he has persuaded himself is a good one, worried the public officers, worried the Attorney-General for the time being, the Lords of the Treasury, and all the public servants, with this repeated litigation, which, as the Attorney-General has well said, is not only expensive, but harrassing to public officers, and causes a great consumption of public time, and a great consumption of public money."

In *Tatum v. Curtis*, decided by the Supreme Court of Tennessee, during its present term, it is held that a judgment based on personal service cannot be vacated in chancery, on the simple unsupported evidence of the judgment defendant that he was not served with process as shown by the officer's return. MCFARLAND, J., for the court, filed a brief opinion as follows: "Bill to enjoin judgment rendered by a justice against complainant upon the ground that he was not served with process. The warrant shows a regular service. The complainant, in his deposition, says he was not served. The officer says he has no recollection, aside from his return, but is satisfied from this, that he did serve the warrant, as he was always particular to make his returns according to the facts. There is no other and very pertinent testimony. The facts and circumstances are not fully developed. The onus of proof is upon the complainant. His own testimony but counterbalances that of the official act and testimony of the officer. It would not do to set aside the judgments of courts and the official acts of officers, upon the simple denial of the service by the party himself, unsupported. Decree affirmed." In Ridgway v. Bank of Tennessee, 11 Hum. 523, the jurisdiction of the Chancery Court was sustained, to entertain a bill to vacate a judgment at law based on a sheriff's return of personal service, the bill averring that such return was not true in fact. The question having been presented on demurrer to the bill, no ruling was made as to the *quantum* or grade of evidence necessary to overthrow the *prima facie* evidence of the return. But several authorities were cited, supporting the jurisdiction of equity to entertain the case, and to hear averments against the truth of the of

ficer's return, though a matter of record. This in effect overruled, (though without noticing it) Love v. Smith, 4 Yerg. 117, where it was held, under a bill directly attacking the return of a sheriff as to property levied on and included in a delivery bond taken by him, that the surety in such bond could not contradict the truth of such return. In a court of law an officer's return is conclusive, and no averments against it can be heard; McBea v. State, Meigs 122; Baxter v. Erwin, Thomps. Tenn. Cas. 175. But when the proceeding is one directly against the officer on account of the same matters involved in the return, it is *prima facie* evidence in his favor, McCully v. Malcom, 9 Hum. 187 (where the officer was sued for false imprisonment), but it is no longer conclusive, and may be disproved by other evidence, Williams v. The State, 2 Sneed 160 (where the officer was indicted for extortion.)

The Supreme Court of Appeals of West Virginia, in *City of Wheeling v. Campbell*, 17 Am. L. R. 386, hold that the statute of limitation, in the absence of an express provision to the contrary, runs against a municipal corporation the same as against a private person—the common law maxim *nullum tempus occurrit regi*, applying to sovereignty only, which means, in this country, the United States and the states themselves in their public capacity. In Dillon on Municipal Corporations, the author says: "Municipal corporations, as we have seen, have, in some respects, a double character. One public, the other (by way of distinction) private. As respects property not held for public use, or upon public trusts, and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within limitation statutes, and be affected by them. For example, in an action on a contract or for tort, a municipal corporation may plead or have pleaded against it the statute of limitations. But such a corporation does not own and can not alien public streets or places, and no laches on its part, or on that of its officers, can defeat the right of the public thereto, yet there may grow up in consequence private rights of more persuasive force in the particular cause than that of the public. It will perhaps be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public, but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author can not assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle; but there is no danger in recognizing the principle of a *estoppel in pais* as applicable to such cases, as this leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not as right and justice may require." The courts of Pennsylvania, New Jersey, Rhode Island and Louisiana have held that the maxim *nullum tempus occurrit regi* is not restricted in its application to sovereignty, but that it applies to municipal corporations as trustees of the rights of the public. Cross v. Mayor, etc., 18 N. J. Eq. 311; Jersey City v. State, 1 Vroom. 521; Simmons v. Cornell, 1 R. I. 519; City of Philadelphia v. Phil. & Read. R. R., 58 Penn. 263; Com. v. McDonald, 16 S. & R. 401; Rung v. Shoenberger, 2 Watt. 23; Mayor, etc. v. Morris Canal & Banking Co., 1 Beas. 561; Mayor v. Magner, 4 Mart. 1. On the other hand, the courts of Vermont, Massachusetts, New York, Connecticut, Maryland, Virginia, North Carolina, South Carolina, Mississippi, Texas, Missouri, Kentucky, Ohio, Illinois and Iowa, have restricted the application of the maxim to sovereignty alone, and most of them have held in cases requiring the decision that municipal corporations, like natural persons, are subject to the statutes of limitation. Kelly's Lesse v. Greenfield, 2 Har. & M. 138; Knight v. Heaton, 22 Vt. 481; Vanck. v. Cor. of New York, 4 Johns. 53; Inhabitants of Litchfield v. Wilmot, 2 Root, 288; Armstrong v. Dalton, 4 Dev. 368; State v. Rich, 7 Rich. 390; Bowen v. Team, 6 Rich. 298; City of Galveston v. Menard, 23 Tex.; Rowan's Exrs, v. Town of Portland, 8 B. Mon. 232; Dudley v. Trustees of Frankford, 12 B. Mon. 610; Alvin v. Town of Henderson, 16 B. Mon. 131; Clements v. Anderson, 46 Miss. 581; County of St. Charles, v. Powell, 22 Mo. 525; School Directors v. George, 50 Mo. 194; City of Cincinnati v. Evans, 5 Ohio St. 594; Lake v. Kennedy, 13 Ohio St. 42; City of Peoria v.

Johnston, 56 Ill. 45; Ch. R. I. & P. R. R. v. City of Joliet, 79 Ill. 40; City of Richmond v. Poe, 24 Gratt, 149; City of Pella v. Scholte, 24 Ia. 283. The West Virginia court, in the principal case, in giving the reason for their conclusion, say: "In Virginia, it has always been held that the maxim *nullum tempus occurrit regi* applies to sovereignty, and Lee, J., in Levasser v. Washburn, 11 Gratt. 572, in giving the reason for the maxim, said: 'The reason sometimes assigned why no laches shall be imputed to the king, is that he is continually busied for the public good and has not leisure to assert his right within the period limited to subjects. A better reason is the great public policy of preserving public rights and property from damage and loss through the negligence of public officers. This reason certainly is equally if not more cogent in a representative government where the power of the people is delegated to others, and must be exercised by them if exercised at all; and accordingly the principle is held to have been transferred to the sovereign people of this country when they succeeded to the rights of the king of Great Britain and formed independent governments within the respective states.' This principle we approve and regard the exemption from the effect of limitation statutes as essential to the well being of the government of the states; but this exemption belongs and appertains to sovereignty alone. The reason for it is very apparent; if the statutes of limitation would run against the state, her public lands, if she had any, would be liable to be taken possesison of by squatters, who would hold them for the time required by the statute and defy the state; and the state in that portion being sparsely populated there would be few or none to complain, as it would be the cheapest way to obtain lands from the state. The highways of the state would be liable to be impaired or destroyed by encroachments, and the country not being thickly settled, and the neighbors all acquainted with each other, and the state officers being remote from these highways, there would perhaps be little complaint. But in a city or town, where so many people are to suffer inconveniences by such encroachments, and the officers of the city or town are on the spot, such encroachments are not apt to be tolerted for a long period, and they would be less likely to be tolerated, if it was known that an uninterrupted possession of a street, alley, or square would, in a certain number of years, give title to the occupier."

WILLFUL ACTS OF SERVANTS.

By the civil law, an owner was answerable for all misdeeds of his slave, Grotius, Ch. 17, § 11, and a principal was liable for all acts of his agent in the line of such agent's authority. Just. Inst. B. 4 Title 7 § 2. The French Constitution of 1453 provided that the sovereign was not responsible for injuries done by his subject outside of such subject's allegiance (Cons. Tom. 3, Title 2), and Pothier, Part 2 Ch. 6 F., 8 Art 2 § 4 states the doctrine of the civil and French law to be that "masters are responsible if servants commit acts in the functions to which they were appointed; for instance, if your coachman, in driving your carriage, has through brutality or unskillfulness caused any damage, you are civilly responsible." It is therefore beyond question that this was a well settled point in the Roman law. The jurisconsults were governed by principles, not by precedents, and the student will find a rich fund of reasoning in the responses and the treatises of Ulpian and Paulus, by which the above doctrine was determined to be an underlying principle, founded in reason and right, and which could not be safely narrowed or broadened. A synopsis of the wide ethical discussion which resulted in this determination would occupy too much space. It was declared to be law by Annual Praetorian Edict, a sure sign that it had been subjected to violent and distinguished criticism and had emerged triumphant. As the foremost judicial officer saw fit to declare its worth by promising through the Edict that it should be law during his tenure of office, it must of necessity have been subjected to suggestions of qualification by many of the eminent scholars of that wonderful empire. It also came to the Romans from Greece, and graced and invested as it was by the charms and prestige of the philosophy underlying the Greek law of nature, it became one of the jewels of Roman jurisprudence, and has enjoyed an uninterrupted recognition on the continent for over two thousand years.

No authoritative decision involving this doctrine could be found in England until abou

two centuries ago, when Lord Holt stated in Middleton v. Fowler, 1 Salk. 282 that "no master is responsible for the acts of his servant but when he acts in the execution of the authority given him." Thus this principle was grafted into the body of the English law, and when adopted, was one of the many instances where texts of the civil law were so transplanted without the source being acknowledged. See Maine's Ancient Law, Ch. on "Law of Nature and Equity." For a whole century this clear language of Lord Holt remained an undisputed part of the common law of England. Then came the decision of McManus v. Crickett. We find from the report in 1 East. 106, and the reference to it in Sleath v. Wilson, 9 C. & P. 612, that Crickett's coachman had a private spite against McManus, who was out riding in his chaise, and such coachman seized the time and opportunity to gratify such spite and maliciously used the defendant's horses and coach to overthrow the chaise and injure the plaintiff, who sued Crickett *in trespass*. Lord Kenyon rightly held that as the action should have been *trespass on the case*, and was therefore wrong *in form*, the plaintiff should not recover. Impressed with the leading feature in the case of the coachman's manifest malice and ill-will, (which does not appear in the reporter's statement of facts) Lord Kenyon went beyond the necessity of the case, and said, *obiter*: "Now where a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt, his master will not be responsible for such acts." It is this language which "C. H. B." at page 412 of the present volume of this Journal, calls luminous, exact, unquestioned, never repudiated or even doubted.

It is clear that while Lord Holt held the master chargeable when the servant acted in the execution of the authority given, he did not say *under what circumstances* the servant would be so acting. Now a servant may quit sight of the object for which he was employed, disregard his master's orders and pursue that which his own malice suggests, and still act in pursuance of the authority given him. See Limpus v. The London Gen. Om. Co., 1 H. & C. 526, where defendant's omnibus driver, *contrary to express orders*, maliciously drove the omnibus in front of a rival omnibus and upset it. The full bench of the Court of Exchequer decided that it could not be held as matter of law that the act was outside the scope of the employment.

Hence, if a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he will not of necessity be acting otherwise than in pursuance of the authority given him, and it does not therefore follow of necessity that the master will not be liable for such acts.

A second objection to Lord Kenyon's dictum is that it leaves an erroneous impression on the mind that Lord Holt decided something more than that the master is never liable but when the servant acts in the execution of the authority given him. And a third objection to the report is that the reporter's statement of facts utterly fails to show the *previous* private malice and spite cherished against McManus by Crickett's servant, but shows only that the collision was intentional at the time, thus leading a casual reader to suppose that Lord Kenyon's dictum was intended to apply to the facts *as stated in the report*, and not to a case where there were really the additional but unmentioned facts of existing spite and active desire to gratify it.

The writer states with some confidence that this sentence of Lord Kenyon, joined with the reporter's misleading statement of facts, has caused more trouble and confusion than any other sentence ever penned by a judge. It has taken the major portion of a century to work back to the simple and pure Roman doctrine of the master's responsibility in all cases *within the scope of the employment*. Even now the vast majority of lawyers will assert that a master is never liable for a servant's willful act.

This dictum in McManus v. Crickett is "repudiated" by Judge Reeve in a lenthy argument, and he says: "The decision in 1 East. 206, is, I apprehend, in opposition to all former received opinions on the subject." Reeve's Dom. Rel. 519, 360. In The Druid 1 Wm. Rob, 403, the court says it is not an express decision; it is stated in South Carolina to have been modified by Seymour v. Greenwood, 7 H. & N. 354, (see Redding v.

S. C. R. R. Co., 16 Am. R 681), and is silently ignored by such English judges as Cockburn and Mellor in several recent decisions to the effect that the dividing line is not the willfulness of the act but the pursuance of the authority and scope of the employment. It is criticised by the entire bench of the New York Court of Appeals as unsound and not in harmony with the later authorities. Isaacs v. The Third Ave. R. R. Co., 47 N. Y. 127. It is not approved in Rounds v. D. L. & W. R. R. Co., 64 N. Y. 134, but on the contrary the court holds the master responsible for acts done by the servant from infirmity of temper or under the influence of passion and done beyond the strict line of his duty or authority, and that, *as to third persons*, the servant can not be said to be acting without the true line of his duty, by doing willful acts where he is authorized to use force. The master was held for a servant's willful act in Shea v. Sixth Ave. R. R. Co., 62 N. Y. 180. In Mott v. The Consumers Ice Company, decided May 22, 1878, by the same court, the master's liability was held not inconsistent with the proposition that the servant "*willfully, and not negligently or carelessly*," drove an ice cart against plaintiff's buggy and injured him. And the court says: "There are intimations in several cases of authority that for the willful acts of the servant the master is not responsible. McManus v. Crickett, 1 East. 106; Wright v. Wilcox, 19 Wend. 343 But these intimations *are subject to the material qualification* that the acts designated willful are not in the course of the employment." The same court held the master liable for a malicious overturning of plaintiff's buggy by a cursing street-car driver, Cohen v. Dry Dock R. R., unreported; and in the Mott case *supra*, has laid down a clear statement of the law. The opinion of Judge Allen is well worthy of its position as the last legal work of that deceased jurist.

In Wisconsin Lord Kenyon's doctrine is regarded as unsafe. Croker v. C. & N. W. R. R., 17 Am. R. 504. And in Indiana the servant's "malice and wantonness" will not necessarily excuse the master. Jeffersonville, &c. R. R. Co. v. Rodgers, 38 Ind. 116. He is liable for the servant's malicious use of a locomotive. T. W. &. W. R. R. Co v. Harmon, 47 Ill. 298; C. B. & Q. R. R. Co. v. Dickson, 63 Ill. 151; Phil. & R. R. R. Co. v. Derby, 14 How. U. S. 568; 34 N. Y. 87. And in Hames v. Knowles, 114 Mass. 518, a servant wantonly and maliciously drove defendant's coach against plaintiff's wagon, and it was held that the wantonness and mischief not only did not absolve the master from liability, but enhanced the damages. So in Shirley v. Billings, 8 Bush, 147, the clerk of defendant's steamer assaulted plaintiff and put out his eye. The master was held. The same rule is found in Hawkins v. Riley, 17 B. Mon. 101. In Duggins v. Watson, 15 Ark. 118, the servants *intentionally* run defendant's steamer into plaintiff's boat; the master was held. And the gun case, 50 Missouri Reports, 104, asserts the master's liability for damages caused by a special violation of orders.

It is submitted that Lord Kenyon's dictum in McManus v. Crickett is not law. It has been repudiated, doubted and shunned. It shows the danger of attempting to add to the Roman rule. All confusion and dissatisfaction over the subject have been caused by a single inexact proposition of an eminent jurist, joined with a reporter's neglect to mention material facts which existed in the case.

LEVANT BROWN.

FRAUDULENT CONVEYANCE—STATUTE OF FRAUDS—INSURANCE.

BERNHEIM *ET AL.* v. BEER *ET AL.*

Supreme Court of Mississippi, April Term, 1878.

Hon. H. F. SIMRALL, Chief Justice.
" J. A. P. CAMPBELL, } Associate Justices.
" H. H. CHALMERS, }

1. WHERE AN INSOLVENT DEBTOR PURCHASES PROPERTY with his own means, and places the title in the name of his wife, equity considers her a trustee *in invitum*, and will fasten a charge upon the property for the payment of his debts.

2. THE CREDITORS HAVE NO CLAIM upon the rents and profits of the property conveyed to the wife.

3. IF THE PROPERTY HAS BEEN SOLD BY THE WIFE, chancery will lay hold of the proceeds for the benefit of his creditors.

4. INSURANCE IS NOT AN INCIDENT TO THE PROPERTY, and where the wife insures the property, and it is burnt, the insurance money belongs to her, and is not liable to the creditors of her husband.

The bill in this case alleged that the partnership of C. & P. Beers was indebted to complainants in the sum of $565.65, due on a bill of exchange;

that C. Beer married the defendant, Josephine Beer, after the debt was contracted, and while he was insolvent; that he purchased certain property with his own means, or those of the firm, and caused it to be conveyed to his wife, who had nothing of her own: that the defendant, The Planters' Ins. Co., insured that property in the name of Josephine Beer; that it was burnt, and the loss was adjusted at the sum of $3,100, which sum was in the hands of the insurance company, who was about to pay it over to her; that there was no other property or fund out of which their debt could be made. Complainant claimed a right, and prayed the court to subject the fund to the payment of their debt.

Josephine Beer and her husband demurred for want of equity on the face of the bill. The demurrer was sustained by the Chancellor, and the bill was dismissed. Complainants appealed.

Nugent & McWillie, for complainants; *Birchett & Gilland*, for demurrants.

SIMRALL, C. J., delivered the opinion of the court:

The complainants, the creditors of C. & P. Beer, predicate their equity on the fund sought to be subjected to their debt, on the predicate of fact, that C. Beer invested his money or that of the partnership, in the purchase of the lot and the erection of the dwelling-house thereon, and had the conveyance made to his wife with the intent to defraud his creditors.

The principle of a court of equity is that a provision for the wife contrived to conceal the means of the husband from his creditors by placing the ostensible title in her, though not within the Statute of Frauds, is void, as to creditors, by the unwritten law. The Statute of Frauds only takes effect on a conveyance made by the fraudulent debtor. The allegations of the bill disclose such a diversion and concealment of the debtor's means to the injury of creditors as operates a fraud on them. A court of law is not competent to pursue such an investment, and separate it from the property into which it has been converted. But a court of equity will lend its aid, and afford relief by treating the holder of the legal title as trustee *in invitum*, and will require her to pay the money to the creditor, or will fasten a charge upon the property to be exonerated by a sale. If the voluntary donee or fraudulent grantee has parted with the property, the court will follow the proceeds into any other property, and will realise out of that the money of the fraudulent debtor traced into it. Carlisle v. Tindall, 49 Miss. 234; Edminson v. Meacham, 50 Miss. 39; Lawrence v. Bank, 35 N. Y. 320; Tabb v. Williams, 7 Humph. 367; Richards v. Ewings, 11 Humph. 327.

The extent of the complainant's rights is to reach the money of their debtor, invested in the lot and the improvements, and pursue it beyond that into any proceeds or other property in which Mrs. Beer has put it. The creditor has no claim upon the the rents and profits realised by Mrs. Beer, nor does their claim against the property relate back to the time she acquired it, so as to entitle them to an account against her.

Is the money owing by the Planters' Insurance Company to Mrs. Beer, in the sense and meaning of the principle, the proceeds of the property, or any part of it, acquired by Mrs. Beer from her husband?

The Planters' Insurance Company became indebted on a contract of indemnity against loss or damage by fire. She had effected an insurance on the dwelling house, which was destroyed by fire. The indebtedness of the insurer was ascertained to be $3,100, on adjustment of the loss. She was the apparent owner in fee. She was absolute owner against all the world except the creditors of the husband. As to them, her title was defeasible on the contingency that they successfully assailed her title as fraudulent. It is not quite accurate to say that her title is defeasible on any event. Her title at law is good. It is not condemned by the Statute of Frauds, but it is subject to the charge for the debtor's money which went into it for the use of the wife. The property could not have been sold under a judgment or attachment, for the entire scope of the Statute of Frauds is to have *property* fraudulently conveyed open to creditors, the *specific property* in the hands of the fraudulent grantee. It does not follow the proceeds. 7 Humph. *supra*. The fraudulent grantee may dispose of the property to a third person for value. Innocent third persons may acquire liens which will be superior to the claims of the creditors of the original grantor. So, if the property has been destroyed by time or accident, the creditor has lost his remedy.

But, as already observed, when the property passes from the grantee, a court of law is unable to go further. But, at that point, a court of chancery extends its efficient arms and lays hold of the proceeds or any other property into which they may have been converted.

But here there has been no sale or exchange by which the original property has disappeared, and notes or bonds are substituted as its representative. The original lot remains, but the house has been destroyed.

We are of opinion that the insurance money owing to Mrs. Beer is not the proceeds of the property, and that it can not be taken from her by the creditors of her husband. As said in Lerow v. Wilmarth, 9 Allen, 385: "The contract (of insurance) was valid, which she had a right to make, and can not be defeated by third persons," who claimed that it was defeasible, if creditors assailed it. In their very natures policies of insurance are not incidents of the property. They are contracts between insurer and insured for indemnity of the assured, and not for loss or damages which another person may have sustained because of the destruction of the property, no matter what the interest of that person may be as mortgagee, creditor or otherwise. If another person have an interest in the property, he may insure for himself, nor can he set up claim to money which has become due to another, unless that other be his debtor, and the money is garnisheed or attached. Carpenter

v. Providence Washington Ins. Co., 16 Pet. 495; Neppes's Appeal, 17 Penn. St. 478-9. The money in question was due to Mrs. Beer, and she was not the debtor of the complainants. It follows that the complainants have no equity on the fund.

Wherefore the decree dismissing their bill is affirmed.

DOWER — WIFE'S POWER TO RELEASE — MODE.

ATWATER v. BUTLER *ET AL.*
McKINLEY v. KUNTZ.

Supreme Court of Tennessee, April Term, 1878.

HON. JAMES W. DEADERICK, Chief Justice.
" ROBT. MCFARLAND, } Associate Justices.
" PETER TURNEY, }
" J. L. T. SNEED, }
" T. J. FREEMAN, }

I. DOWER—STATUTORY RESTRICTION—POWER OF WIFE TO RELEASE.—Though the right of dower be restricted by statute to those lands of which the husband dies seized, still the right accrues, as by common law, at the marriage; hence, the wife may, during coverture, release by apt words her dower interest in her husband's lands.

2. MODE OF RELEASE.—General covenants in a deed, or words which do not necessarily import a release of dower, will not be construed as such release, though the homestead might be expressly waived in the same conveyance.

MCFARLAND, J., delivered the opinion of the court.

Complainant charges that her husband, Griffin Atwater, was in his life time the owner of a certain house and lot, which constituted their homestead; that they executed a deed of trust conveying the property to a trustee to secure a debt owing by her husband to the defendant, Butler; and that she joined in the deed, which contains this clause, to wit.: "We hereby release and relinquish all right, claim and interest whatever, in and to said lot of ground, which is given by or results from all laws of this state pertaining to the exemption of homestead or dower." Griffin Atwater died before this deed of trust was foreclosed. The bill prays to have the trustee enjoined from selling so as to affect complainant's right of dower, with a prayer to have dower assigned.

It is argued with much ingenuity that a married woman can not release or convey her right to dower under our law. The argument is that under our statutes, the right to dower does not accrue until the death of the husband; that before the death of the husband, the wife has no right or interest in the land; and that a married woman can not bar or estop herself by her deed as to future rights, but can only convey, in the mode prescribed by the statute, such present right or interest in the land as she may own.

It can not be seriously denied that where the right of dower exists as at common law, the wife may release her right by joining in the conveyance of the husband for that purpose.

By the common law the wife was entitled to dower in a third of all the lands of which the husband was seized at any time during the coverture. Her right related to the marriage, which was a valuable consideration, and her claim was therefore superior to the purchaser from the husband after the marriage, and also superior to the claims of creditors.

By an act of 1784. this common law right of the wife was changed; her right to dower was restricted to the lands of which the husband died seized. The question then arose whether the widow's right to dower after this statute was or was not superior to the claims of creditors. If her right only accrued upon the death of the husband, and she took her interest from him as the heir took his title, it was argued that she must take subject to the claims of creditors, precisely as the heir takes.

It was held, however, in Combs v. Young, 4 Yerg. 218, that the widow's claim was still superior to the claims of creditors, notwithstanding the act of 1784. The decision was placed upon the ground that the widow's right in reference to lands of which the husband dies seized, stands upon the same footing it did previous to the act of 1784. That is, her right relates to the marriage, and she is a purchaser for a valuable consideration. The change effected by the act of 1784 was that the right of dower is defeated, either by the absolute conveyance of the husband, or by any means which divests the husband's title absolutely. The purchaser from the husband has a superior right to the widow; but if the husband die seized of the land, the widow's right is not regarded as accruing at that time, but relates to the marriage.

The case of Combs v. Young was recognized and approved in Rutherford v. Read, 6 Hum. 423, where it was held the claim of dower was superior to the claim of a creditor who had secured a specific lien by levy of an execution in the life time of the debtor. It was held that this was not changed by the act of 1856, Code, sec. 2399. See Tarpley v. Gannaway, 2 Cold. 246. This act of 1856, which gives dower in lands mortgaged, where the mortgagor dies before foreclosure, is simply a partial return to the common law. That is to say, previous to this act, the right of dower might be defeated by the deed of the husband; but after this latter act was passed, the right would not be defeated by the deed of the husband conveying the land to secure debts, unless the deed was foreclosed and the land sold before the husband's death. Dower might still be defeated, however, by the absolute conveyane of the husband.

That the dower right still rests upon the common law principle, with the modification we have stated, is fully recognized in Boyer v. Boyer & Bradley, 1 Cold. 12, where it was held that a widow was not entitled under the act of 1856, to dower in lands mortgaged by the husband before the marriage, although he died before foreclosure, upon the ground that the wife's inchoate right attaches upon the marriage, and as the land had

been conveyed before the marriage her right did not attach, although her claim was directly within the letter of the statute. Although the act of 1856, above referred to, gave dower to the widow where the lands were mortgaged to secure debts, and the debtor died before foreclosure, still this right would be defeated by the subsequent absolute alienation by the husband, as we have held.

These authorities fully establish that during the coverture, the wife has the inchoate right of dower as at common law; and as it can not be seriously denied that she could convey or release her right of dower, when that right exists at common law, we think it equally clear that she may release or convey the right, notwithstanding the changes in the common law made by our statute.

Although we have no special statutes authorizing a *feme covert* to release her inchoate right of dower, yet we think she may convey or release this right under the same principle that our law allows her to convey any other interest she may own in lands. It is true that her conveyance or release can only be important in cases of mortgages or deeds of trust, as in cases of absolute conveyances her assent or joining in the deed is not necessary. We have examined the authorities referred to, but we think the conclusion we have reached is correct. The decree of the chancellor will be affirmed.

The case of Annie McKinlay v. Christian Kuntz, trustee, is in all respects similar, except that the deed contains no express release of dower. It is a conveyance to secure debt. It purports to be the deed of the husband and wife, and uses the usual words of a conveyance by both, with covenants of warranty. After giving to the trustee a power of sale, the deed adds: "And, in the event of sale, we waive all equity of redemption and re-purchase and homestead in said property"; but the deed contains no express release of dower. It is made absolutely essential under our constitution and statutes, that the wife shall join in the deed to bar her right of homestead; and where she joins for that purpose only, we do not think her right of dower will be thereby lost, as in cases of mortgages and deeds of trust, where the husband dies before foreclosure or sale. In the present case it is true words are used which seem sufficient to convey any interest the wife might have had in the land. Still we think the purpose only was to release the right of homestead, as this is expressly specified.

Mr. Bishop says, it is commonly held that the deed must contain apt words signifying a release of dower; that, for instance, it is not sufficient for the wife to join the husband in the general covenants of the deed. See Bishop on Rights of Married Women, section 449.

We hold that the complainant, in this case, did not release her right of dower by her deed, and the decree of the chancellor will be reversed.

NOTE.—The Tennessee (South Carolina) statute of 1784 gave to the widow the right of dower in "all the lands and tenements and hereditaments of which her husband died seized or possessed;" and this provision is carried into the code at sec. 2398, the provision of the act of 1823 being added, which extended the dower right to lands of which the husband at death was the equitable owner.

The act of 1784, for its restrictions upon the common law, was severely critised by Catron, C. J., in Combs v. Young, 4 Yerg. 218; and on account of these restrictions the act was there construed strictly, the court holding that in all other respects save the particular lands in which dower was allowed, the common law still prevailed, so that the doctrine was still adhered to, that the right of dower relates to the marriage, the widow being still recognized as a purchaser for a valuable consideration. This rule that the right of dower is only inchoate during coverture being even then vested in the wife was reaffirmed in Watkins v. Watkins, 7 Yerg. 292, and Boyer v. Boyer, 1 Cold. 12.

In Chester v. Greer, 5 Hum. 26, and McIver v. Cherry, 8 Hum. 713, it was held that under the act of 1784, the widow is not dowable of lands mortgaged by the husband, because he did not die seized and possessed of such. These decisions led to the "partial return to the common law" shown in the act of 1856, code, sec. 2399; by which the widow is also "entitled to dower in lands mortgaged or conveyed in trust to pay debts, when the husband dies before foreclosure of the mortgage or sale under the deed." Thus a legislative, as well as a judicial adherence to the rules of the common law concerning the origin and quality of the dower estate was shown.

From the concluding portion of the opinion in the principal case, it follows that it will be essential to recite, in every deed in which a married woman joins to lands in Tennessee, the extent and character of the interest or estate she intends to convey or release.

HOMICIDE—ACCIDENTAL KILLING OF ANOTHER BY ONE ATTEMPTING TO COMMIT SUICIDE.

COMMONWEALTH v. MINK.

Supreme Judicial Court of Massachusetts—November Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" OTIS P. LORD,
" AUGUSTUS L. SOULE,

SUICIDE being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal, and if one attempting it kills another, though not intending his death, the act is criminal homicide, and, at the least, manslaughter.

Indictment charging the defendant with the murder of Charles Ricker, by shooting him with a pistol.

It was proved at the trial that Ricker came to his death by a shot from a pistol in the hands of the defendant.

Evidence was introduced by the defendant tending to show that she had been engaged to be married to the deceased; that an interview was had between them at her room, in the course of which he expressed his intention to break off the engage-

ment and abandon her entirely; that she thereupon went to her trunk in her room, took the pistol from it and attempted to use it upon herself, with the intention of taking her own life; that deceased then seized her to prevent her from accomplishing that purpose, and a struggle ensued between them, in which the pistol was accidentally discharged, and that in that way the fatal wound was inflicted upon him.

The jury were instructed as follows: "I understand her to say that she put the pistol to her head, or, at any rate, that she took it out of her trunk with the intention of committing suicide. Now, supposing that you believe her story, and that she did put the pistol to her head with the intention of committing suicide, she was about to do a criminal and unlawful act and that which she had no right to do. It is true, undoubtedly, that suicide can not be punished by any proceedings of the courts, for the reason that the party who killed himself has placed himself beyond the reach of justice, and nothing can be done. But the law, nevertheless, recognizes suicide as a criminal act, and the attempt at suicide is also criminal. It would be the duty of any by-stander who saw such an attempt about to be made, as a matter of mere humanity, to interfere and try to prevent it. And the rule is that, if a homicide is produced by the doing of an unlawful act, although the killing was the last thing that the party about to do it had in his mind, it would be an unlawful killing, and the party would incur the responsibility which attaches to the crime of manslaughter. Then you are to enquire, among other things, and if you reach that part of the case, did this woman attempt to commit suicide in his presence, and, if she did, I shall have to instruct you that he would have a right to interfere and try to prevent it by force. He would have a perfect right, and I think I might go further, and say that it would be his duty to take the pistol away from her, if he possibly could, and to use force for that purpose. If, then, in the course of the struggle on his part to get possession of the pistol, to prevent the person from committing suicide, if, in the course of such struggle, the pistol went off accidentally, and he lost his life in that way, it would be a case of manslaughter, and it would not be one of those accidents which would excuse the defendant from being held criminally responsible. Did she get into such a condition of despondency and disappointment that she was trying to commit suicide, and was about to do so? If that was her condition, if she was making that attempt, and he interfered to prevent it, and got injured by an accidental discharge of the pistol (as I told you), it would be manslaughter."

The jury found the defendant guilty of manslaughter. And to the foregoing rulings and instructions the defendant excepted.

GRAY, C. J., delivered the opinion of the court.

The life of every human being is under the protection of the law, and can not be lawfully taken by himself, or by another with his consent, except by legal authority. By the common law of England, suicide was considered a crime against the laws of God and man, the lands and chattels of the criminal were forfeited to the King, his body had an ignominious burial in the highway, and he was deemed a murderer of himself and a felon, *felo de se*. Hales v. Petit, Plow 253, 261; 3 Inst. 54; 1 Hale P. C. 411, 417; 2 Hale P. C. 62; 1 Hawk, ch. 27; 4 Bl. Com. 95, 189, 190. "He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he did it merely of his own head." 1 Hawk. ch. 27, § 6. One who pursuades another to kill himself, and is present when he does it, is guilty of murder as a principal in the second degree; and if two mutually agree to kill themselves together, and the means employed to produce death take effect upon one only, the survivor is guilty of the murder of the one who dies. Bac. Max. *reg.* 15; Rex. v. Dyson, Russ and Ry. 523; Reg. v. Alison, 8 C. & P. 418. One who encourages another to commit suicide, but is not present at the act which causes the death, is an accessory before the fact, and at common law escaped punishment only because his principal could not be first tried and convicted. Russell's Case, 1 Moody, 356; Reg. v. Leddington, 9 C. & P. 79. And an attempt to commit suicide is held in England to be punishable as a misdemeanor. Reg. v. Doody, 6 Cox, C. C. 463; Reg. v. Burgess, Leight & Cave, 258; s. c, 9 Cox, C. C. 247.

In the colony of Massachusetts, by the Body of Liberties of 1641, all lands and heritages were declared to be free, not only from all feudal burdens, but from all escheats and forfeitures upon the death of parents or ancestors, be they natural, casual or judicial, to which latter codes, besides inserting the word "unnatural," added, "and that forever." Body of Liberties, art. 10; 28 Mass. Hist. Coll. 218, Mass. Col. Laws, (ed. 1660) 48; (ed. 1672) 16; Anc. Chart. 147. The principle thus declared has always been followed in practice; and there has accordingly never been in Massachusetts any forfeiture upon one's death on conviction or suicide unless under some particular statute creating the crime, of which no instance is remembered. 5 Dane Ab. 4, 251, 252; 7 Dane Ab. 318. But suicide continued to be considered *malum in se*, and a felony.

In 1660, the legislature "judgeth that God calls them to bear testimony against such wicked and unnatural practices, that others may be deterred therefrom," and therefore enacted that every self-murderer "shall be denied the privilege of being buried in the common burying-place of Christians, but shall be buried in some common highway, where the selectmen of the town—where such person did inhabit—shall appoint, and a cartload of stone laid upon the grave as a brand of infamy, and as a warning to others to beware of the like damnable practice." 4 Mass. Col. Rec., pt. 1,432; Mass. Col. Laws (ed. 1672) 137; Anc. Chart. 187. That statute, though fallen into disuse, continued in force until many years after the adoption of the constitution of the commonwealth. 7 Dane Ab. 208, 298.

An early statute of the Province directed that the form of verdict upon a coroner's inquest should

state "where, at what time, by what means, with what instrument and in what manner the party was killed or came by his death," and that "if it appear to be self-murder, the inquisition must conclude after this manner, viz: And so the jurors aforesaid say upon their oaths, that the said A B, in manner and form aforesaid, then and there voluntarily and feloniously, as a felon of himself, did kill and murder himself, against the peace of our sovereign Lord and King, his crown and dignity." Pro. St. 1700, 1701 (3 W. III) c. 3, § 7; 1 Prov. Laws (State ed.) 429; Anc. Chart. 350. This accorded with the usual, though, perhaps, not necessary, form of common law. 1 Saund. 356. A statute passed at the close of the American Revolution upon the same subject, re-enacted these directions, except in substituting for the last clause, "against the peace and dignity of the commonwealth and the laws of the same." St. 1783, c. 43, § 2.

In Commonwealth v. Bowen, 13 Mass. 356, it was held that where one counseled another to commit suicide, who, by reason of his advice, and his presence did so, the adviser was guilty of murder. The grounds of the decision of that case appear more clearly in the full report of the trial in a pamphlet published at Northampton, in 1816, from which the statement of the case in 13 Mass. is taken.

The indictment, drawn by Perez Morton, Attorney-General, contained two counts. The first count alleged that Jonathan Jewett, with a cord, of which he tied and fastened one end around his neck, and the other end around the iron grate of a window, "feloniously, willfully, and of his malice aforethought, did hang and strangle himself," and by reason thereof died, and so, as a felon of himself, in manner and form aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder himself." This count then went on to allege that the defendant, "before the felony and self-murder aforesaid," "feloniously, willfully and of his malice aforethought, did counsel, hire, pursuade and procure the said Jonathan Jewett the felony and murder of himself as aforesaid, in manner and by the means aforesaid, to do and commit," and so the defendant, the said Jewett, "in manner and form aforesaid, feloniously, willfully and of his malice aforethought, did kill and murder." The second count was an ordinary count for murder, alleging that the defendant murdered Jewett by tying and fastening and procuring to be tied and fastened a cord around his neck and around the iron grate of a window, and, thus hanging, strangling and suffocating him, and causing and procuring him to be hung, strangled and suffocated. Bowen's Trial, 3, 6.

At the trial, before Chief Justice Parker, and Justices Jackson and Putnam, the Attorney-General put in evidence, without objection, the verdict of the coroner's jury, finding in substance that Jewett was found dead in prison, with a cord around his neck and around the iron grate, and concluding, in the form prescribed by the statute of 1783, that he "feloniously and as a felon of himself, killed and murdered himself." Bowen's Trial, 12. The defendant's counsel, in argument, having stated that the first count charged the defendant as an accessory before the fact by aiding and abetting the murder, and the second count as the actor and principal in the murder, the chief justice suggested that he considered both counts to charge the defendant as principal, and to this the attorney-general assented. p. 22.

The chief justice, in charging the jury, said: "You have heard it said, gentlemen, that admitting the facts alleged in the indictment, still they do not amount to murder—for Jewett himself was the immediate cause and perpetrator of the act which terminated in his own destruction. That the act of Bowen was innocent no one will pretend, but is his offence embraced by the technical definition of a principal in murder? Self-destruction is doubtless a crime of awful turpitude; it is considered in the eye of the law of equal heinousness with the murder of one by another. In this offence, it is true the actual murderer escapes punishment; for the very commission of the crime, which the law would otherwise punish with its unmost rigor, puts the offender beyond the reach of its infliction. And in this he is distinguished from other murderers. But his punishment is as sure as the nature of the case will admit; his body is buried in infamy, and in England his property is forfeited to the king. Now if the murder of one's self is felony, the accessory is equally guilty as if he had aided and abetted in the murder of A by B; and I apprehend that if a man murders himself, and one stands by, aiding in and abetting the death, he is as guilty as if he had conducted himself in the same manner where A murders B. And if one becomes the procuring cause of death, though absent, he is accessory." Bowen's Trial, 51, 52. It is evident that this part of the charge relates solely to the first count; for the introductory words, "admitting the facts alleged in the indictment," could have no application to the second count; and what was said about an accessory was comparatively immaterial, because the defendant, as we have already seen, was charged as a principal only.

Suicide has not ceased to be unlawful and criminal in this commonwealth by the simple repeal of the colony act of 1660, by the St. 1823, ch. 143, which (like the corresponding St. of 44 Geo. IV, ch. 52, enacted by the British Parliament within a year before), may well have had its origin in consideration for the feelings of innocent surviving relatives; nor by the briefer directions as to the form of coroners' inquests in the Rev. Stats., c. 140, § 8, and the Gen. Stats., ch. 175, § 9, which in this, as in most other matters, have not repeated at length the forms of legal proceedings set forth in the statutes codified, nor by the fact that the legislature, having in the general revision of the statutes, measured the degree of punishment for attempts to commit offenses by the punishment prescribed for each offense if actually committed, has, intentionally or inadvertently, left the attempt to commit suicide without punishment, because the completed act would not be punished in any manner. Rev. Stats., ch. 133, § 12; Gen. Stats., ch.

168, § 8; Com. v. Dennis, 105 Mass.162. After all these changes in the statutes, the point decided in Bowen's case was ruled in the same way by Chief Justice Bigelow and Justices Dewey, Hoar and Chapman, in a case which has not been reported. Com. v. Pratt, Berkshire, 1862.

Since it has been provided by statute that "any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered," it may well be that suicide is not technically a felony in this commonwealth. Gen. Stats., ch. 168, § 1; Stat. 1852, ch. 37, § 1. But being unlawful and criminal as *malum in se*, any attempt to commit it is likewise unlawful and criminal. Every one has the same right and duty to interpose and save a life from being so unlawfully and criminally taken, that he would have to defeat an attempt unlawfully to take the life of a third person. Fairfax, J., in 22 E. IV, 45, pl. 10; Marler v. Ayliff, Cro. Jac. 134; 2 Rol. Ab. 559; 1 Hawk. ch. 60, § 23. And it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his death, is guilty of criminal homicide, and, at the least, of manslaughter.

The only doubt that we have entertained in this case is, whether the act of the defendant, in attempting to kill herself, was not so malicious, in the legal sense, as to make the killing of another person, in the attempt to carry out her purpose, murder, and whether the instructions given to the jury were not therefore too favorable to the defendant.

EXCEPTIONS OVERRULED.

WHAT CONSTITUTES A LIFE INSURANCE CONTRACT — CO-OPERATIVE COMPANIES HELD INSURANCE COMPANIES.

STATE OF MISSOURI, *EX REL.* BEACH, CIRCUIT ATTORNEY, v. CITIZENS BENEFT ASSOCIATION OF ST. LOUIS.

St. Louis Court of Appeals, March Term, 1878.

[Filed June 4, 1878.]

HON. EDWARD LEWIS, Presiding Justice.
" ROBERT BAKEWELL, } Associate Justices.
" CHAS. HAYDEN, }

1. INSURANCE BUSINESS A FRANCHISE. — Making assurance upon lives by a corporation in this state is the assertion of a grant from the state, and the exercise of it without a grant is a usurpation. At common law any man might insure, but within recent times the business has been the subject of legislative regulation, and in this state it has been taken under control of the state for the better security of policy holders, and no individual, association or corporation can engage in it without a grant from the state.

2. LIFE INSURANCE CONTRACT — WHAT WILL CONSTITUTE ONE. — In an insurance contract the sum to be paid is commonly spoken of as a sum certain, but if, by the terms of the contract, the amount to be paid can be ascertained, then the requirement is met, and it does not change the nature of the contract that the sum or amount was uncertain at the period of insurance, or that the company insuring was only to pay the amount it succeeded in collecting; it is sufficient that the amount is definitely fixed at the time of the loss, or that it can be afterwards ascertained; nor does the non-assignability of a policy change its character.

3. INSURANCE BUSINESS UNDER CONTROL OF STATE. — All persons or associations doing insurance business must comply with the requirements of the insurance laws, which were framed for the express purpose of doing away with associations of individuals professing to be friendly associations for mutual indemnity.

4. INSURANCE COMPANY — WHAT IS.—Individuals associated together by no other tie than that of mutual indemnity, having paid officers, giving premiums for new members, and in which the sole condition of membership is health and probable duration of life, are engaged in insurance. Whether if their primary object is literary, social or benevolent, to which a feature of mutual insurance is added, they would be—*query?*

5. QUO WARRANTO.—Information in the nature of, is the proper remedy where a company or corporation exercises a franchise not granted.

The information charges that, without any charter or lawful authority, the defendant has engaged in the making of insurance upon human lives for and in consideration of premiums paid; that of making contracts whereby in consideration of a sum of money in gross and of periodical payments of stipulated sums of money, it undertakes to pay money at a time depending upon the death of the person whose life is insured, and generally in doing and transacting the business of making assurance upon the lives of individuals, and transacting the business of a life insurance company.

The return, or plea to the information contained: first, justification under an incorporation under Art. 8, Chap. 37 Wag. Stat.; second, that its object, as set out in charter and by laws, "is to give financial aid to the widows and children of deceased members, or to such uses and purposes as such members shall, by last will and testament direct, from funds obtained by assessments upon its members made for that purpose upon the death of each member." The articles of association, certificates of incorporation and by-laws being filed and made part of answer; third, "that it has carried on on its business strictly in pursuance of said object and purpose, and in no other manner and for no other purpose or object whatever, and that it has not in any manner engaged in or carried on the business of life insurance."

A stipulation as to the facts was filed, by which it appears,

First. That the charter or articles of association and certificates of association attached, as well as the by-laws filed, are those of defendant. That it is doing business under them and has no other authority.

Second. The applicants for membership are only admitted upon the signing of paper marked exhibit B., and on passing a satisfactory examination and obtaining a satisfactory medical certificate.

Third. That a certificate of membership (see copy in opinion) is issued to each member—that it is the form issued and used by the Board of

Trustees regulating and prescribing the amounts per member to be paid by the association, and determining the classification.

Fourth. That defendant is engaged in issuing such certificates, collecting dues and assessments, paying death losses and operating by means of and on the plans shown in the above exhibits.

Fifth. That subject to the limitations and requirements in the articles of association, by-laws and applications for membership, the public at large may become members.

Sixth. That it has no charter as an insurance company, under the insurance laws, nor any certificates or authorization from the insurance department.

On these pleadings and facts the counsel for the state moved for judgment.

The company was organized Dec. 20, 1877.

Motion for judgment of *ouster* on the pleadings, facts and law.

Geo. D. Reynolds and *R. Graham Frost* of counsel with the Circuit Attorney, for the motion.

1. The contract between the association and its members is an insurance contract. Bouvier's Law Dict., Titles "Insurance," "Insurance on Lives—Contract, 1 and 2;" Burrell Law Dict. Title "Insurance;" 1 Marshall on Insurance, pp. 1, 52, 53; 2 Ibid. pp. 766, 767, and notes; Bliss on Life Ins., 2d Ed., § 3; May on Insurance, § 1; Harrison v. Miller, 7 T. R. 340; Lees v. Smith, 7 T. R. 338; Commonwealth v. Wetherbee, 105 Mass. 149. The prohibition is against the mode of doing the business, not against the object. The fact that the purpose of defendant's organization is charitable or benevolent does not change the character of its business; the primary object of all insurance was benevolence. Com. v. Wetherbee, *supra*; 2 Marsh. Ins. *supra*; Gov. of Alms House, &c., v. American Art Union. 3 Selden (N. Y.) 237. Nor does the fact that no sum in gross is set out in the contract, change its character—enough appears in the contract to enable the sum to be made certain. Com. v. Wetherbee, *supra;* Broom's Legal Maxims, 7th Ed., § 624. Nor does the absence of a guarantee fund, *eo nomine*, or of a stipulation to make such a fund responsible for the payment of the loss, change the character of the contract. At most the absence of such a feature affects the solvency of the company and lessens the security to be insured.

2. The policy of this state requires persons or companies doing life insurance business to comply with certain laws (see Wag. Stat. Chapt. 76) and prohibits companies as well as individuals and associations of individuals from carrying on the business except in a certain manner and under certain restrictions prescribed. Wag. Stat., Chapt. 76, Art. 2, §§ 1, 10, 11, 12, 19, 21, 23, 36, 46. On the recommendation of the Insurance Department made through the governor of the state (3 Ann. Rep. Mo. Supt., Part 2, p. 14, *et seq*) the law was amended in 1874 so as to include associations of individuals, as well as corporations. See Acts. 1874, p. 81, §§ 3 and 5.

Incorporation under Art. 8, Chapt. 37 Wag. Stat. conferred no authority to do insurance business. Art. 8 (old chapt. 70, G. S. 1865) was not intended to cover insurance; when it first was enacted chapts. 67 and 90, Gen. Stat. 1865, provided for insurance corporations. Even if it ever did, the act. of 1869 (Wag. Stat. chapt. 76, § 53) repealed it. The circuit court had only such power as to creating corporations as the statutes gave it, and if it be admitted that the insurance character of the defendant appeared by its articles of association, then the certificate of the court was void; if it did not appear, then it has perverted a lawful charter to an unlawful use and has usurped a franchise never conferred.

4. This form of insurance is so unsafe as to have been prohibited by name in Michigan (Nat. Life Ins. Co. v. State Coms. of Ins., 25 Mich. 321) and cannot be carried on in our state under the law, as no such company can meet the requirements of chapt. 76 Wag. Stat.

5. Quo warranto is the proper remedy. People *ex rel* Att'y Gen'l v. Utica Ins. Co., 15 Johns. 358.

McGinnis & Searle for defendant, in printed argument.

If the defendant is for purpose of life insurance, and if that is its business as judged by its constitution, by-laws, and the nature and conduct of its business, then it has no organization under the insurance laws and must fall. We have no statutory nor judicial definition of life insurance; the legislature and courts treat it as being defined and well understood. After search we have been unable to find any adjudication as to whether associations like this come within the definition of life insurance. Life insurance is a contract, by which the insurer, in consideration of a gross sum or annual payment, agrees to pay the person for whose benefit the insurance is effected, or his executors, administrators or assigns, *a certain sum* of money, or an annuity, on the death of the person so insured, whenever it happens, if the insurance is for the whole life; or in the event of the death happening within a certain period, if the insurance is only for that period. 3 Kent, 365; Wms. Real Prop., 159 V. 1: Smith's Merch. Law, 456; Bunyon 1, 5; Baron Parke, 15 C. B. 365. Our insurance laws were enacted in view of and under the above principle. It governs joint stock as well as mutual companies. All those elements must be in an insurance contract.

To sustain the promise of insurance, the insured person must pay a gross sum or an annual payment. The revenue from this is to meet losses. The defendant does not require either a gross sum or annual payments. It only requires a certificate fee of one dollar, and an annual membership fee, according to the class. Sec. 1, Art. 2 By-Laws. This revenue is not to meet losses, but to pay expenses. If any surplus should accrue, it is to be invested in state or U. S. bonds, or might be used in building hall, etc. Part 10, Articles of Association; Sec. 1. Art. 4, By-Laws; Act Apl. 1, 1877.

Payment of widows, etc., is only provided for by assessment upon surviving members. Part 7, Art. Association; Sec. 2, Art. 2 By-Laws. The payment of such an assessment is neither payment

of a gross sum or of an annual payment in consideration to support any promise to pay widow, etc., upon death of member.

The consideration on the part of the company must be to pay a certain sum of money on the death of the person insured. But the object of the defendant is to give financial aid to the widows, etc., of deceased members. Part 1, Art. Ass'n.

The fund to do this with is derived from assessments upon survivors. Part 7, Art. Ass'n; Secs. 2, 3, 4, Art. 2 By-Laws. These sections provide for the payment of no *certain sum of money*, nor is provision made for the absolute payment of any sum. Hence the association is not a life insurance company. An examination of the certificate of membership, which is the contract, and the only one entered into, shows this. By this certificate no certain aggregate sum is promised. It is not even an ascertainable sum, because the surviving members cannot be held legally bound to pay his assessment. If he fails to pay, he merely ceases to be a member. It is not only an uncertain sum, but by the proviso of the contract, is a contingent one. Nor can the defendant be made to pay unless it has collected. So that the sum to be paid is totally uncertain, contingent, conditional and incapable by legal means of being made otherwise. All that can be made of the defendant is that it is a charitable body formed to financially aid the widows and children of deceased members; it is voluntary in its operations, its continuance, its membership and in the payment of fees and assessments on part of its members, and dependent for its existence, benefits and charities upon the honor and benevolence of its members. Com. v. Wetherbee, 105 Mass. 149, relied on by the state, is not parallel. The two contracts are very different. The case, so far as it goes, is in favor of the defendant here. It classifies the Connecticut company as a life insurance company upon the very reasons which necessarily show that this defendant is not one. The policy of the Connecticut company was assignable—this is not. That could transact its business anywhere—this is confined to St. Louis.

The defendant is merely a beneficial association, confines its operations within the sphere of its own members, who are bound together by respect and confidence, and who rely on one another and not on the promise of the association. It issues no policies, and its business is not for profit.

BAKEWELL, J., delivered the opinion of the court.

This was an information in the nature of a *quo warranto* filed by the Circuit Attorney against defendants, for carrying on the business of life insurance within the city of St. Louis without any charter or lawful authority.

The return alleges that defendant is a corporation organized under the general law in regard to benevolent associations, for the purpose of giving financial aid to the families of deceased members from proceeds of assessments upon the members of the association; that defendant has, in all respects, strictly pursued the objects for which it was created, and has never carried on a life insurance business.

The answer is accompanied by an agreed statement of facts, of which the charter and by-laws of defendant, the form of contract with its members, and blank forms of examination on application for membership, form a part.

Relator asks for judgment of ouster upon the pleadings and evidence.

The articles of association of defendant, filed at the time of the application for incorporation under the provisions of law in regard to the incorporation of benevolent associations (Wag. p. 339, §§ 1, etc.) state that its objects are to give financial aid to the widows and children of deceased members, or to such uses as the members shall by last will appoint. If there are neither widow, children, nor will, then the aid is to form part of the general fund of the association. Applicants for membership must be between twenty-five and fifty-five years old and residents at the time of St. Louis or of East St. Louis, on the opposite side of the river, in Illinois. The Board of Trustees accept or reject applications. The officers, and the mode of their election and their duties are set out. The Board of Trustees are authorized to make by-laws to regulate the terms of membership and rate of initiation fee; to divide the membership into classes according to the sum to be paid on the death of a fellow member, and to limit the number of members in each class: to regulate the manner and time of payment, and the amount to be paid to the representatives of a deceased member of a class; to determine the disposition of the surplus funds; to provide for new offices and officers; to amend the by-laws; to provide what shall constitute forfeiture of membership; and to provide a rule for the equitable distribution of its property among its members if two-thirds of its members shall determine to close the affairs. The association may hold personality to the amount of $250,000; it may continue for ninety-nine years; the trustees may invest the surplus funds in bonds of the State or of the United States and not otherwise.

The by-laws require every person applying for membership to answer, in writing, printed questions such as are usually put by insurance companies, and to furnish a certificate by a medical examiner, such as is usually required by such companies.

The association consists of two classes, A and B —each limited to 2,000 members; one man may belong to both classes. The annual membership fee for men under forty is $5 in class A and $3 in class B, and for members over forty it is $3 in A and $4.50 in B. On admission each member pays a certificate fee of $1 and an assessment fee as upon a member's death. When a member dies each member of his class is assessed $2.50 or $1, according to the class of the deceased—the higher assessment being for class A. Proofs of loss are to be filled up according to a blank form, and if found correct, on investigation, the Board orders payment in thirty days, and causes an assessment of the class of the deceased; if this is not paid in

thirty days failure to pay forfeits membership; the member who has forfeited may be reinstated on payment of arrears. The Executive Committee is to take charge of all business and property, and see to the safety of investments. It meets at semi-monthly intervals, and its members are paid $2 each for each attendance, and may hold extra meetings. The duties of other officers are set forth. The manager and secretary receive such compensation as the trustees provide. The manager is to solicit for members; and each member receives $1 for each applicant he procures who is accepted. The certificate of membership is in the following form:

Class B——, No. —, Citizens' Benefit Association of St. Louis.

This certificate of membership witnesseth that the Citizens' Benefit Association of St. Louis, in consideration of the representations made to it in his application for membership, which is hereby made part hereof, and of the sum of —— dollars, to be paid on or before the ——— day of ——— in every year during the continuance of his membership in this association, and of one death assessment of $1 to it in hand paid; and the further sum of $1 to be paid by him to this association within thirty days after notice served on him of each death occurring in the membership of class B of this association, promises and agrees to and with the said ——, well and truly to pay or cause to be paid to ——, wife, or the legal representatives of the said ——, within thirty days after due notice and satisfactory evidence of the death of the said ———, the sum of $1 for every surviving member of class B of this association. Provided, however, that in the event of the non-payment of assessment of any member or members of said class within the prescribed time, then the residue of said benefit shall be paid to the person or persons entitled thereto under this certificate as and when collected thereafter; but in no case shall any sum be paid until so collected by assessment upon the said surviving members of said class B, as provided by the regulations of this association, and subject always to said rules and regulations, upon the condition, however, that if the said ——— shall fail to pay any assessment or sum becoming due under this agreement, or under the rules of this association, now in force or hereafter passed, when the same becomes due, then this agreement shall be null, void, and of no effect, and all previous payments by the said ——— made, shall be forfeited to this association. In witness whereof the said association has caused its seal to be hereto attached, and these presents to be signed by its President and Secretary, at the city of St. Louis, this — day of ——.

——— President.
——— Secretary.

It is admitted that defendant has no authorization from the Insurance Department of the State; and that it has neither charter nor articles of incorporation under any provision of the law of the state relating to the incorporation of insurance companies.

The exercise of the right of carrying on the business of making assurance upon lives by a corporation in this state, is the assertion of a grant from the state to exercise the privilege, and is, therefore, the usurpation of a franchise, unless it can be shown that the privilege has been granted (acts 1874, p. 91, sec. 3-5). It is conceded that defendant was not incorporated under the law in regard to insurance corporations; that it has no power to carry on an insurance business, and that it complied with none of the provisions of the law specially applicable to insurance companies. If, then, it appears from the facts stated, that defendant is carrying on an insurance business, as it shows no authority for the exercise of such a franchise, the state is entitled to judgment of ouster. It is contended by respondent that the contract made by defendant with each of its members, is not, properly speaking, a contract of insurance; that it differs from the ordinary contract of insurance in the following respects:

That defendant does not agree to pay a certain sum in case of the death of the assured; it does not even agree to pay a sum which may be rendered certain as so many dollars for each member of the class to which assured belongs.

The payment is subject to a contingency that the members of the class in which the assured died shall pay their assessments. The amount to be paid is not to exceed a certain sum, but it may be diminished by a failure to collect the assessments. At the expiration of thirty days the defendant is to pay the legal representatives of the deceased such sum as shall have been collected of assessments made upon the members of the proper class, and, from time to time thereafter, such further sum as shall be collected from such assessments. This money is not to be paid to the assignee of the insured. If he makes no will and leaves no widow or children, no payment is to be made.

In these respects the contract differs from that under consideration in the case of Commonwealth v. Wetherbee, decided by the Supreme Court of Massachusetts in 1870 (105 Mass. 149), a case in many of its features very similar to the one before us, and the only case, so far as we are informed, in which the question as to whether organizations of this character are to be considered insurance companies and subject to the insurance laws of the state, has been considered.

There the court held that all that is requisite to constitute a contract of insurance is the payment of a consideration by the one and the promise of the other to pay the amount of insurance upon the happening of the loss; that the fact that the object of the organization was benevolent and not speculative was immaterial, and that, though the amount payable was not a gross sum, but a sum graduated by the number of persons in the class at the time of the death of the insured, and though there was no means provided for enforcing payment of premiums, the contract was a true contract of insurance; and that the conviction of defendant for acting as agent of an insurance company not incorporated in the Commonwealth without first procuring a license from the Insurance

Commission ought to be sustained. In that case, the judge delivering the opinion of the court defines a contract of insurance as an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.

The text writers generally give similar definitions, and in the definitions of the contract cited by them from the reports, the amount to be paid on the happening of the loss is commonly spoken of as a fixed sum, or a certain sum. In Patterson v. Lowell, 9 Bright. 320, cited in the text of Bliss on Life Insurance, p. 4, insurance is defined to be "a contract in which a sum is paid as a premium in consideration of the insurer's incurring the risk of paying a larger sum upon a given contingency." "Insurance," says Marshall (Vol. I, p. 1), following the civilians whom he cited in the note, "is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event," and the "insurance of life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made a stipulated sum, or an annuity, equivalent upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time." Vol. 2, p. 766. The law, however, is not fond of definitions; and these definitions are to be taken, perhaps, rather as statements by the learned men who make them of the contract as they find it existing around them, than as strict definitions, which contain every essential element, without which the thing can not exist, and exclude everything not necessary to its being.

It is true that in the contract of insurance the sum to be paid is commonly a sum certain, or that may be rendered certain, and which, therefore, is really certain, according to the well known maxim. Thus, in the contract considered in the Massachusetts case, the amount to be paid, though uncertain at the period of insurance, is definitely fixed at the time of the loss, and that amount the company agrees to pay. In the present case, the amount which the company is to pay is fixed in the same manner by multiplying the number of insured in the class to which deceased belonged by the amount of the assessment, but it is provided that the insuring company shall be liable for no more of that amount than is actually collected by it, or than it can collect by the exercise of proper diligence. We do not think that this proviso renders the sum uncertain in such a sense as to make that which, but for this provision, would be a contract of insurance, really a contract of a wholly different nature. It may be asked, if this is not a contract of insurance, what is it? In many recognized forms of insurance, the actual amount to be paid is not rendered certain until the death of the insured. In this form it is rendered certain as soon the month within which the members must pay as their assessments has passed. If those assessments are not paid, the company can not compel their payment; the member not paying merely forfeits his membership, and the fact that any such member may possibly be re-instated and pay his arrearage, and that his assessment would then be payable to legal representatives of the deceased, does not create such an uncertainty about the sum to be paid as to destroy the character of this contract as one of insurance. The policy of insurance in defendants' company is not assignable; but we do not think that it is of the essence of a policy of insurance that it should be capable of being thus transferred, though it is probably true that policies are commonly made transferrable with the assent of the company issuing them. In the case under consideration, the policy may be transferred by last will, at the pleasure of the insured, but not otherwise. At common law, any man might insure; but, on the suggestion that commerce might suffer considerably by persons in insolvent circumstances failing to make their losses good, the British Parliament, about 150 years ago, in accordance with the existing practice of granting monopolies, gave the exclusive right of marine insurance, which alone was practised then, to two companies (Marsh Ins. 48), and, since that date, both in England and this country, the business of insurance has been the subject of special legislative provisions. In this state it is the policy of the government to subject insurance business to the control of the state for the better security of policy holders. All persons and all organizations doing an insurance business are subject to severe restrictions, onerous conditions and the constant supervision of a department organized especially for that purpose. Wag. ch. 76. It has long been the law that no corporation shall transact any insurance business which does not deposit certain securities and comply with all the provisions of the insurance law. Wag. 744, § 22. In 1872, the superintendent of insurance called the attention of the government, in his annual report, to a supposed necessity of making the insurance law in express terms applicable to individuals, and also to associations of individuals professing to be friendly associations for mutual indemnity; and subsequently an act was passed, on March 28, 1874 (Acts 1874, p. 81, §§ 3 and 5), amending the general insurance law, and providing that no company, no individual, and no association of individuals, shall do an insurance business in Missouri, unless he or they have complied with all the insurance laws of the state. The policy of the state is clearly declared by these acts.

If, as we think, the contract of defendant with its members is a contract of insurance, then it would appear that the main, and indeed the only object of its existence is to do an insurance business. It is not a society bound together by any other common object. Men of all colors, creeds, professions and classes may belong to it, and it can in no respect be assimilated to organizations founded for religious, benevolent and literary purposes. Its one feature is life insurance; its active

officers are paid; and it offers a premium for bringing in new risks. The only condition of membership is a certain condition of health and probability of duration of life. The case presented is not that of an organization whose primary object, is social, literary or benevolent, and to which a feature of mutual insurance is added for the purpose of mutual aid. Such associations may exist which can not be said to be carrying on the business of insurance, and with which, we suppose, it was not the intention of the legislature to interfere.

We think that plaintiff is entitled to judgment, and it is so ordered. All the judges concur.

NOTE.—Article 8, Wag. Stats., under which defendant justifies, is entitled "Benevolent, Religious and Educational Associations." Section 1 (as amended, see act of 1874, p. 22), reads: "Any lodge of Freemasons, or Odd-Fellows, divisions of Sons of Temperance, Grange, subordinate grange or county council of Patrons of Husbandry, or any other association organized for benevolent or charitable purposes, or any library company, school, college or other association organized for the promotion of literature, science or art, or any gymnastic or other association organized for the purpose of promoting either of the objects above named, and for all similar purposes, by whatever name they may be known, consisting of not less than three persons, and also any association of merchants and others in any incorporated city, organized not for pecuniary profit, but as a board of trade, or chamber of commerce, or exchange, or under any other name, for the general promotion of trade and commerce, or of any special branch thereof, in such city, consisting of not less than nine persons, may be constituted and declared a body politic and corporate, with all the privileges, and subject to all the liabilities and restrictions contained in this act" (chapter).

Sec. 2 provides for filing articles and petitions for incorporation with circuit court.

Sec. 3 provides that the circuit judge, if he "shall be of the opinion that said articles of association be not inconsistent with the constitution or laws of the United States, or of this state," shall permit the articles to be filed with the clerk, and issue a certificate of incorporation in prescribed form." Sec. 4 provides for amendments to articles of association. Sec. 5 provides for churches becoming incorporated. Sec. 6 provides for corporate meetings. Sec. 7 authorizes raising of money; 8, for record of proceedings; 9, fees of clerks. In 1874 (p. 23), a new section was added authorizing colleges to confer degrees, and in 1877 three new sections were added, providing for the consolidation of companies and the merger of their charters. This is the substance of article 8 as it is now in force.

The sections of the insurance laws (ch. 76, art. 2, Wag. Stats.), in point are:

"Sec. 1. That any number of persons not less than thirteen may associate and form a company for the purpose of making assurance upon the lives of individuals, and every assurance pertaining thereto, or connected therewith, and to grant, purchase and dispose of annuities and endowments of every kind and description whatsoever."

Sec. 4 requires corporators to file in the office of superintendent of insurance a declaration containing copy of proposed charter.

Sec. 10 requires the superintendent to submit the charter to the attorney-general of the state, who examines it, and if found by him correct, he returns it to the superintendent; the superintendent then delivers certified copy to corporators, and they become a body corporate, authorized to receive subscriptions.

Secs. 11 and 12 provide that when the company has subscriptions, or proposals for insurance of a prescribed character and amount, and that it has certain amount of moneys or stocks or bonds, and has deposited with the superintendent a certain amount of securities, he shall issue a certificate of authority to commence business, which is filed with the recorder of the county, and is the authority of the company.

Secs 19 and 21 prohibit any home companies from doing business in the state until they make a deposit of securities with the superintendent.

Sec. 36, as amended (see acts of 1874, p. 81, § 3), provides that "No company shall transact in this state any business mentioned in the first section of this act, unless it shall first procure from said superintendent a certificate stating that the foregoing requirements have been complied with, and authorizing it to do business. * * * * Every such company shall be required to procure annually, for the use of its agents and solicitors, copies of a renewal certificate of authority hereinafter provided for."

(Before the amendment of 1874, sec. 36 read: "no such company mentioned in the 13th section of this act shall transact in this state any business mentioned in the first section thereof, unless," etc. The companies mentioned in the thirteenth section are stock and mutual companies.)

The 46th sec. (Wag. Stats., p. 756, ch. 76), reads: "No company organized under the provisions of this act shall undertake any business or risks, except as herein provided," etc. As amended in 1874 (acts 1874. p. 81, § 5), sec. 46, reads: "That no individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in the first section of this act within this state, unless he or they shall first fully comply with all the provisions of the laws of this state governing the business of life assurance."

Sec 53. repeals the old assurance laws (chs. 67 and 90 G. S. 1865), and all other acts and parts of acts inconsistent with the act.

THE LEGAL DEFINITION OF REASONABLE BELIEF.

Two cases of some importance, on the subject of the effect, in the eye of the law, of reasonable belief, as affording an excuse for a certain course of action, are reported in the current number of Cox's Criminal Cases. One of them is a decision of the Queen's Bench Division in this country, and in it the question arose as to how far reasonable belief may be an answer to an action for malicious prosecution. The facts of the case to which we refer (Lowe v. Collum, 13 C. C. C. 641) were briefly as follows: The plaintiff and defendant had a serious dispute about business matters. The defendant received a letter threatening his life, which letter, after showing it to his wife and son, he forwarded to the authorities at Dublin Castle, together with a letter, stating that he believed the threatening letter to have been written by the plaintiff, and enclosing another admittedly in the handwriting of the plaintiff. In consequence of this, criminal proceedings were instituted by the Government, and the plaintiff was prosecuted at Petty Sessions; and on the hearing of the summons, which, however, was dismissed, the defendant gave evidence as a witness against the plaintiff. He had, also, sworn an information against him. The plaintiff then brought the present action for maliciously causing the summons to be issued. One of the issues knit on the pleadings was whether the defendant did the act mentioned in the plaint: and this issue seems to have been submitted

to the jury by the learned judge who tried the case (Mr. Sergeant Armstrong), with the observation that there was evidence proper for their consideration to sustain the affirmative of that issue—namely, the defendant's act in swearing the information, followed by the prosecution in fact. On this portion of the case Mr. Justice Fitzgerald's observations are worthy of notice: "If the first issue had been left to the jury with that instruction only, I should have no hesitation in coming to the conclusion that in this particular case the instruction was erroneous. The case is peculiar. There is no doubt that the prosecution was in fact instituted and carried on, and the summons sued out at the instance of the public prosecutor and not the defendant, and further, that the actual position of the defendant in making his information was a witness alone. *Prima facie*, therefore, he is not responsible for the prosecution, and the mere making of the information, followed by the subsequent proceedings at Petty Sessions, would not make him liable. He may, however, on other grounds be answerable. The defendant set the authorities in motion by his letter to the Chief Secretary, and if he then entertained the opinion and did believe that the letter called the threatening letter was in the plaintiff's handwriting, and laid the case before the authorities with a view to bring the offender to justice, he would not be responsible for the prosecution that followed, even though it was clear he was mistaken, and though the opinion he entertained should subsequently appear to have been unreasonable. But if, on the other hand, the defendant, by a statement willfully false—that is to say, by representing the letter in question to be in the handwriting of the plaintiff, when he either knew it was not, or did not believe that it was—induced the public prosecutor to enter on the enquiry and institute an unfounded prosecution, then he may justly be held responsible for the consequesnces." This latter section of the learned judge's judgment is certainly necessary as a safeguard to the somewhat sweeping doctrine laid down. It would perhaps not have been too much if the doctrine had been a little further qualified by an allusion to what we take to be the undoubted law, as laid down in Perryman v. Lister, R. L. 3 Ex. 197—namely, that the absence of inquiry is an element in determining the question of reasonable and probable cause. Although the decision of the Exchequer Chamber in that case was finally reversed in the House of Lords (L. R. 4 H. L. 535), yet this test was accepted as a correct one by their Lordships, while under the circumstances of the case, reversing the judgment for the defendant. Some test of this sort ought, in our opinion, be applied, for otherwise the mere fact of the honesty of the belief would justify an obstinate and vindictive person, who sincerely believed in some delusion, in persecuting a perfectly innocent person. In such a case as this, the protection afforded to a witness might easily be made a method of injustice.

These views will be found, to some extent, endorsed in the judgment of Lord Justice Brett in the other case to which we have alluded, which is reported in the same number of the criminal cases. Clark v. Molyneux, 14 C. C. C., p. 10. The general result of that case may be shortly stated as follows: In an action for libel and slander, the judge ruled that the occasions of publication were privileged, and left the question to the jury whether the defendant honestly and reasonably believed his statement to be true. It was held by the Court of Appeal, reversing the decision of the Queen's Bench Division, that this was a misdirection, and that there must be a new trial; because it had not been explained to the jury that the burden of proof was on the plaintiff, and because the reasonableness of the defendant's belief was immaterial. It is, however, chiefly for the observations of Lord Justice Brett that the case is valuable in the present connection. After alluding to the fact of the communication being privileged, he proceeds: "If he does not use the occasion for the reason for which the privilege was given, but uses it for some indirect and wrong reason or motive of his own, then there is malice. There are certain tests as to when malice exists. It is not malice as in pleading that is to be understood by the expression in cases of this kind, but it means a wrong feeling in the defendant's mind. There are two tests to show whether there is malice, when defamatory statements have been published on a privileged occasion. If it is proved that the defendant stated what he knew at the time to be false, then everybody assumes the existence of malice, and that he acted from a wrong motive, and no one inquires what the motive was. But, supposing it is not proved that the defendant knew at the time that what he stated was false, still he may not be acting for the reason for which the privilege was given; and if from anger or any wrong motive he states as true what he does not know to be true, the jury may infer that he did not make the statement for the true reason, but that he made it from an indirect motive; and if he has acted for any other reason than that for which the privilege is given, he would not be protected." His Lordship further observes—and this part of his judgment clearly would seem to be in support of Mr. Justice Fitzgerald's statement—"I apprehend that if he did believe the statements to be true, and if want of belief in their truth was the only thing tending to show malice alleged against him, the only question would be, not would a reasonable man believe the statements to be true, but did the defendant believe them. The test of stupidity and obstinacy is not a fair one—for stupidity or obstinacy would only be evidence tending to show that the belief was not genuine." However this may be, in our humble opinion it is quite possible that honesty and stupidity, or vindictiveness, may co-exist to such an extent as ought to render a person liable in damages, even though he might really believe in the truth of his statements. The rule, at any rate, laid down in Perryman v. Lister would seem to be a sound one, and not lightly to be overlooked.

An interesting and instructive case on this subject will be found reported in the *New Zealand Jurist*, New Series, Vol. I, p, 21, which would seem to point to the fact that juries in the colonies are permitted at least as wide a latitude as would be allowed in this country. In that case, Blakely v. Rolland, an action for malicious prosecution, Williams, J., observes—"The reasonableness of belief was admitted by the defendant to be a question for the jury, but he contended that in the present case there was no dispute at all as to the facts, or as to inferences of facts, as all the evidence was adduced by the plaintiff, and there was no conflict of evidence. It seems to me that although the facts are undisputed, yet there may be various inferences from these facts, and that such inferences were rightly left to the jury." It may be questioned whether this decision is sustainable in point of law. The true doctrine, in our opinion, as to the province of a jury in cases of this nature will be found decided in a recent American case, reported in the April number of the *Virginia Law Reporter*, Vol. II, p. 217. In that case, Womack v. Circle, Burks, J., says—"The question of probable cause is a mixed proposition of law and fact. The existence of the facts and circumstances is a question of fact for the jury, their sufficiency a question of law for the court. It was so held by Lord Mansfield and Lord Loughborough in the celebrated case of Johnston v. Sutton, 1 Term R. 510." This, in our opinion, is the correct statement of the law. The New Zealand case, if followed, would place the jury in a position which trenches too closely on the province of the judge. Lord Chelmsford's dictum in Lister v. Perryman (p. 535) is—"No definite rule can

be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description is only nominally the verdict of a jury." In conclusion, we may observe that in Coulter v. The Dublin and Belfast Junction Railway Company, 9 I. L. T. Rep. 212, Barry, J. has very lucidly pointed out the distinction between the evidence of malice supplied in an action for malicious prosecution by the absence of probable cause, and that supplied in an action for libel by the unexcused publication of defamatory matter; showing that, in the former, if the judge decides that there is a want of probable cause, that want is merely evidence from which the jury *may* infer malice, while, in the latter, if the judge decides that there was no lawful excuse for the publication, the jury *must*, from its defamatory nature, infer that the defendant was actuated by a malicious motive.—[*Irish Law Times*.

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE, } Associate Justices.
" JAMES L. WORDEN, }
" GEORGE V. HOWK, }
" SAMUEL E. PERKINS, }

POLICY OF INSURANCE—VOIDABLE—CONTRACT.—A policy of insurance provided that on the failure of the assured to pay an installment of the premium note, the policy should be void during the continuance of such non-payment: *Held*, the policy was not rendered void by such non-payment, but simply voidable by the company, and the premium note was not void nor voidable by the payee thereof, and the company might maintain its suit upon the note. By the terms of the policy, if the assured paid the note without suit, such payment restored the suspended animation of the policy, and if he paid it at the end of an execution the payment would have the same effect. Opinion by PERKINS, J.—*American Insurance Co. v. Henley*.

TENDER — SUFFICIENCY OF — REFUSAL.—Tenders are to be considered strictly, and if they are not legal in every respect, even a court of equity will not support them nor supply defects. The refusal of a tender must be absolute, and a refusal " till I consult my attorney," does not amount to a refusal in law. It is the duty of the debtor who owes money to seek his creditor and pay his debt wherever the creditor may be found in the state. Where the note upon which a tender was made was deposited in bank, in a sealed envelope: *Held*, that the bank had no authority to break the envelope, and was not authorized to receive the money due upon the note, and a tender to the bank was therefore insufficient. Opinion by BIDDLE, J.—*King v. Finch*.

RAILROADS—NEGLIGENCE—PLEADING.—It is well settled that a person may set a fire on his own premises for any lawful purpose, and is not liable for the injury such fire may inflict upon the property of others, unless he is guilty of negligence in permitting the fire to escape; that is, in keeping, taking care of and controlling such fire. 107 Mass. 494; 44 Barb. 424. Hence, where the charge was that the defendant " set fire to rubbish and trash along and upon the grounds which the defendant used for the purpose of operating trains of cars upon its road, which fire did communicate with the plaintiff's wood," etc., negligence in permitting the spread of the fire constituted the gist of the action, and the failure to charge such negligence rendered the complaint insufficient on demurrer. Opinion by NIBLACK, C. J.—*P. C. & St. L. R. R. Co v. Culver*.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MICHIGAN.

April Term, 1878.

HON. J. V. CAMPBELL, Chief Justice.
" T. M. COOLEY, } Associate Justices.
" ISAAC MARSTON, }
" B. F. GRAVES, }

PARTITION—FINAL DECREE — APPEAL.—A decree in partition which declares the rights of the several parties in lands, and orders partition accordingly, with a reference to the commissioner to examine and report the situation of the premises, and whether they can be partitioned without injury to the owners, is a final decree, from which an appeal must be taken, or the merits of the controversy are settled. Opinion by MARSTON, J.—*Shephard v. Rice*.

CHATTEL MORTGAGE WITHOUT ACTUAL CONSIDERATION—RIGHTS OF ASSIGNEE. — Where a chattel mortgage not securing negotiable paper is given for a sum named, but really to secure future advances, and none have been made, an assignee, though taking it for value and in good faith, supposing it to have been given for an actual indebtedness, has no rights superior to those of the mortgagee. Opinion by COOLEY, J.—*Judge v. Vogel*.

REMOVAL OF FENCE — SETTLEMENT OF BOUNDARIES—DEDICATION.— In an action against highway commissioners for removing plaintiff's fence, evidence that a survey had been made with plaintiff's consent to fix the line of the highway, and that plaintiff promised to remove his fence accordingly is admissible as showing not a dedication by parol, but one by unequivocal present conduct, involving the concurrent action of the land owner and the highway authorities in determining the lines by a survey made for the express purpose. Opinion by CAMPBELL, C. J.—*McMillan v. McCormick*.

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1878.

HON HORACE GRAY, Chief Sustice.
" JAMES D. COLT, } Associate Justices.
" SETA AMES, }
" MARCUS MORTON, }
" WILLIAM C. ENDICOTT, }
" OTIS P. LORD, }
" AUGUSTUS L. SOULE, }

CONTEMPT OF COURT — FRAUDULENT CONVEYANCE.—1. The conveyance and transfer of his property, by a husband, in anticipation of his wife's filing a libel against him for a divorce and alimony, and with intent to prevent the execution of any decree for alimoney that she might obtain, are a fraud upon her for which she might in proper form have redress. Burrows v. Purple, 107 Mass. 428, 435. 2. But such acts could not of themselves constitute a contempt of court, because a person can not be in contempt of court for disobedience of an order not yet passed, and of which therefore he can not have had notice. Thompson v

Basillkew, 3 Ch. Rep. 114; Winslow v. Nayson, 113 Mass. 411; *In re* Chiles, 22 Wall. 157, 169. Opinion by GRAY, C. J.—*Stuart v. Stuart.*

INSURANCE—EVIDENCE — DESCRIPTION OF PROPERTY.—In an action upon a policy of insurance covering the "fixed and movable machinery, engine, lathes and tools," of the plaintiffs, who were manufacturers of machinery made of cast iron, it was *Held* (1), that parol evidence was inadmissible to show that the parties intended to include wooden patterns which were necessary to make the castings for the machinery, under the general term of "tools," there being no ambiguity in the terms of the policy, and no claim that its meaning was modified by any understood or established usage. 2. That the term "tools" may be interpreted as covering all patterns which from their size and shape admit of being applied and managed by the hands of one man. Opinion by AMES, J.—*Lovewell. v. Relief Ins. Co.*

CHECK—CONSIDERATION— INSTRUCTION. — In an action of contract by the indorsee of a check drawn by defendant in favor of one C, in payment of a balance of account claimed by him and supposed by the defendant to be due him for services, it appeared that the plaintiff held the check merely for collection for C, and that C was to be paid a specified sum per month. The defendant claimed and offered evidence tending to show that C did not render the service; that if he rendered any service he had been paid in full for it when the check was given, and that, if not, the services were of less value above the amount already paid him than the amount of the check. The court instructs the jury that the same defense was open to the defendant against the plaintiff as against C; that the burden was upon the plaintiff to show a sufficient consideration for the check; that if C had broken his contract for services with the defendant, the defendant was entitled to have damages for such breach set off against the check by way of recoupment or defense in whole or in part. *Held*, that this instruction was not open to exception. Opinion by SOULE, J.—*Magen Furnace Co. v. Boston Soapstone F. Co.*

ABSTRACT OF DECISIONS OF THE ST. LOUIS COURT OF APPEALS.

[Filed June 4, 1878.]

HON. EDWARD A. LEWIS, Presiding Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

ADMISSIONS—ESTOPPEL—PARTITION AGAINST MINOR DEFENDANTS.—1. Admissions made in ignorance of one's legal rights, without any intention of influencing the conduct of another, and which are not shown to have had that effect, do not estop the person making the incautious admission afterwards to assert the truth. 2. Proceedings in partition against minor defendants who were not served with process are void, and could not be cured by any proceedings under the act of Nov. 21, 1857. Acts 1857, adj. sess. p. 52. Reversed and remanded. Opinion by BAKEWELL, J.—*Hall v. Cavenaugh.*

WHERE THE MAKER OF A NEGOTIABLE NOTE IS DEAD, the note should be presented at maturity to his administrator, if he can be found with reasonable exertion; and, if no effort be made to make demand upon the administrator, the fact that the notary to whom the note was given for presentment did not know that the maker was dead is no excuse; and the neglect of the presentment to the administrator releases the indorser. The fact that the administrator had no legal authority to pay the note until duly allowed against the estate, does not relieve the holder from the obligation of making demand. Affirmed. Opinion by BAKEWELL, J. — *Frayser's Ad'mx, v. Dameron.*

INSURANCE—"OTHER INSURANCE"—MISREPRESENTATION.—1. The stipulations in a policy against other insurance are not violated by "other insurance" which is not legal insurance. The true issue is whether the policy which is said to violate the stipulation was really binding on the insurer. 2. When the insured signs a printed form of application filled up by the agent of the company which he was not asked to read, and which he is not given time to read intelligently, the fact that such form contains a misrepresentation of a material fact will not necessarily defeat a recovery where the insured appears to have acted in good faith, and to have answered truly and frankly all inquiries made of him by the agents of the company at the time of the insurance. Reversed and remanded. Opinion by HAYDEN, J.—*Dahlberg v. St. Louis F. & M. Ins.*

ADMINISTRATION—SURETIES—LIABILITY—SETTLEMENT.—1. In a proceeding under the statute (Wag. p. 81, sec. 67), to ascertain the amount in the hands of an administrator when his term expires, and to order the rendition of the same to his successor and to enforce the order against his sureties, where there are two successive bonds, and the sureties on each bond are liable for the total defalcation, the sureties on both bonds are properly made parties to the proceeding, and judgment may be rendered against all for the amount found due. 2. Where money is paid on the general liability by one who is a surety on both bonds, in the absence of any directions, it will be applied on his liability on the oldest bond. 3. The annual sworn settlement of the administrator is competent, in such a proceeding, as an admission, though it is not conclusive. Statements in it may be contradicted by the party by whom it is offered. Affirmed. Opinion by BAKEWELL, J.—*Lewis v. Gambs et al.*

QUERIES AND ANSWERS.

[In response to many requests from lawyers in all parts of the country, we have decided to commence again the publication of questions of law sent to us by subscribers. We propose to make this essentially a subscriber's department—*i. e.*, we shall depend, to a large extent, upon them to edit this column. Queries will be numbered consecutively during the year, and correspondents are requested to bear this in mind when sending answers.]

QUERIES.

37. SURETIES—CONTRIBUTION.— A B C & D were sureties on E's bond as administrator of an estate. D sold said administrator (E) real estate, the debts not yet having been paid, receiving therefor moneys belonging to said estate. At the time there was in the hands of the administrator assets in the shape of notes amply sufficient to pay all indebtedness of the estate, which were subsequently converted by the administrator to his own use. A judgment was taken on the bond for the remaining debts, and execution paid by each of the sureties—the administrator being insolvent. Can the sureties, A B & C, recover of D, their co-surety, the money received by him to the amount they paid. F.

BOOK NOTICE.

A TREATISE ON THE LAW OF JUDICIAL AND EXECUTION SALES. By DAVID RORER, of the Iowa Bar. Second Edition. Chicago: Callaghan & Co. 1878.

It seems more proper to speak of this as a new work than as a second edition of the author's treatise on judicial and execution sales, published several years ago. The first edition has had such a complete revision as to render it hard to recognize. The principles stated have been re-examined and more thoroughly discussed. A large number of new cases have been added. Its size is increased by over two hundred pages. Much of it has been re-arranged, and most of it re-written. Its index has been made more complete than ever. Under these circumstances it can not be doubted that the favor which was extended to this work on its first appearance will be doubled in the reception of the present edition. The profession are indebted to the author for a book on a branch of the law which other treatises on the shelves of a lawyer's library do not fully enter into. The matter of this treatise is of daily concern to the practitioner, and we know of no other work which can take its place.

NOTES.

In the case of *State ex rel. Circuit Attorney v. Citizens Benefit Association*, published in this issue, the Court of Appeals rendered a verbal decision on the 18th inst. The defendant applied for an appeal to the Supreme Court. The application was resisted on the ground that a judgment of ouster against a corporation for usurpation of a franchise was not within any of the causes or cases enumerated in sec. 12, art. 6, of the Constitution granting appeals or writs of error. The court held the point well taken and refused an appeal.

In an address before the Iowa Bar Association, delivered last month, and which has since been published in pamphlet form (Mills & Co., Des Moines, Ia.), Judge Dillon gave an interesting historical sketch and description of Westminister Hall and the English Inns of Court. It is there where the Judges of England have sat and the lawyers have been trained for centuries, and to the American lawyer there is an interest attaching to these places which makes Judge Dillon's sketch highly entertaining and not uninstructive. As Thackeray says of them: "These venerable Inns which have the Lamb and Flag and the Winged Horse for their signs, have attractions for the persons who inhabit them, and a share of rough comfort and freedom, which men always remember with pleasure. I don't know whether the student of law permits himself the refreshment of enthusiasm, or indulges in poetical reminiscences as he passes by historical chambers, and says, 'Yonder Eldon lived—upon this side Coke mused upon Lyttleton—here Chitty toiled—here Barnwell and Alderson joined in their famous labors—here Byles composed his great work upon Bills, and Smith compiled his immortal Leading Cases—here Gustavus still toils, with Solomon to aid him'; but the man of letters can't but love the place which has been inhabited by so many of brethren, or peopled by their creations as real to us at this day as the authors whose children they were—and Sir Roger de Coverly walking in the Temple Garden, and discoursing with Mr. Spectator about the beauties in hoops and patches who are sauntering over the grass, is just as lively a figure to me as old Samuel Johnson rolling through the fog with the Scotch gentleman at his heels on their way to Dr. Goldsmith's chambers in Brick Court; or Henry Fielding, with inked ruffles, and a wet towel around his head, dashing off articles at midnight for the Covent Garden Journal, while the printer's boy is asleep in the passage."

The *Law Times*, of a recent date, contains a short sketch of the history of the law as to admitting evidence touching the disposition, motives and character of witness and prisoners. It has, during the last few years, undergone considerable changes. In Queen Caroline's case, 2 Br. & B. 284, the common law judges having been summoned by the House of Lords, laid down the following rule, which touches but does not decide the point in question: "If, on the trial of an action or indictment, a witness, examined on the part of the plaintiff or prosecutor, upon cross-examination by defendant's counsel, state that at a time specified he told A that he was one of the witnesses against the defendant, and, being re-examined by the plaintiff's or prosecutors counsel, states what induced him to mention that to A, the plaintiff's or prosecutor's counsel can not further re-examine the witness as to such conversation, even so far only as it relates to his being one of the witnesses." The ruling of eight judges against one (Best, J., dissenting), was confirmed by the house. In the eighth year of William III, Sir John Friend was indicted for treason. A Capt. Blair, who had received some kindnesses from the accused, was the chief witness against him. Another witness was called who knew nothing against the accused personally, but was able to confirm the statements of the first, so far as to prove that the statements were not a recent invention. 13 Howell's State Trials, 32 Gilbert & Buller, are conflicting authorities on the rule as to whether, in answer to proofs of statements made by a witness in variance with his testimony at the trial, evidence may be given by the party who called the witness that he confirmed the same thing on other occasions, and is still consistent with himself. Russell, Vol. 3, p. 593, holds that the better opinion seems to be that evidence is not admissible, except in cases where counsel on the other side impute a design to misrepresent from some motive of interest or relationship. Even during the Stuart State Trials it was allowed to discredit a witness by proving subornation or corruption. Thus, on his trial for high treason, A. D. 1679, Richard Langhorne, after arguing that Oates and Bedlow, having received pardons, were to be treated as approvers, continued: "I desire to know whether they have not received any rewards or gratifications for the discovery they have made, and the service they have done." Mr. Justice Pemberton replied: "Do you think, Mr. Langhorne, that the King will bribe his witnesses?" But Lord Chief Justice Scroggs put the first part of the question to Oates, who, however, evaded it; and Lord Chief Justice North told the prisoner, if he could suppose there was any subornation or corruption, to call his witnesses and prove it. R. v. Langhorne, 7 Howell, 446. In Lord Stafford's case, evidence was admitted to show that a witness had offered a bribe, the object being to show that he was so affected towards the party accused as to be willing to adopt any corrupt course in order to carry out his purpose. 7 Howell, S. T. 1400. Even the turbulence of the Popish plots and the highhanded proceedings of Chief Justice Jefferies and Scroggs did not upset the practice of calling witnesses to character. One Benjamin Harris, a bookseller, was indicted for causing to be printed and sold a libel, entitled "An appeal from the country to the city for the representation of His Majesty's personal liberty, property and the Protestant religion." One neighbor was called who looked upon him as a fair conditioned, quiet, peaceable man, and so reputed among his neighbors. Another neighbor had never heard of him that he was wont to oppose or scandalize the king or government.